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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
8

9 SONNY RAY SAMPSON,

10 Plaintiff,

11 v.  
12

13 CAROLYN W. COLVIN,  
14 Commissioner of Social Security,

15 Defendant.  
16

No. 1:14-CV-03136-JTR

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

17 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF  
18 Nos. 14, 17. Attorney Thomas A. Bothwell represents Sonny Ray Sampson  
19 (Plaintiff); Special Assistant United States Attorney Franco L. Becia represents the  
20 Commissioner of Social Security (Defendant). The parties have consented to  
21 proceed before a magistrate judge. ECF No. 6. After reviewing the administrative  
22 record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion  
23 for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

24 **JURISDICTION**

25 Plaintiff filed an application for Supplemental Security Income (SSI) on July  
26 20, 2010, alleging disability beginning on October 30, 2000. Tr. 94, 209-15. The  
27 application was denied initially and upon reconsideration. Tr. 128-34, 138-43. On  
28 August 11, 2011, an attorney advisor issued a fully favorable decision approving

1 Plaintiff's application and dismissing Plaintiff's request for hearing. Tr. 114-22.  
2 On March 7, 2012, the Appeals Council set aside the decision and remanded the  
3 case to an Administrative Law Judge (ALJ) for a hearing and a new decision. Tr.  
4 123-26, 156-60.

5 On December 17, 2012, ALJ Ilene Sloan held a video hearing at which  
6 Plaintiff, represented by counsel, testified as did vocational expert (VE) Debra  
7 Lapoint. Tr. 34-93. The ALJ issued an unfavorable decision on March 8, 2013.  
8 Tr. 10-25. The Appeals Council denied review. Tr. 1-5. The ALJ's March 2013  
9 decision became the final decision of the Commissioner, which is appealable to the  
10 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial  
11 review on September 22, 2014. ECF No. 1, 4.

## 12 **STATEMENT OF FACTS**

13 The facts of the case are set forth in the administrative hearing transcript, the  
14 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
15 here.

16 Plaintiff was 31 years old at the time of the hearing. Tr. 62. Plaintiff  
17 dropped out of school in sixth or seventh grade. Tr. 63. Plaintiff last worked in  
18 2001 and 2002 when, together with his sister, he took care of his other sister's  
19 child. Tr. 67-69; *but see* Tr. 68 (Plaintiff thought he might have watched two of  
20 his sister's children). Plaintiff has never had a drivers' license and does not drive.  
21 Tr. 69. Plaintiff has difficulty reading, but looks at comic books and magazines.  
22 Tr. 80-81.

23 Plaintiff states he cannot work because he forgets things and he sometimes  
24 "lose[s] it . . . blow[s] up and . . . do[es] stuff unintentionally." Tr. 77.

25 Plaintiff spends most of his time playing video games, and considers himself  
26 a player of average skill, although he is sometimes confused by the buttons. Tr.  
27 70, 80. Plaintiff can go grocery shopping with his sister, prepare microwave  
28 meals, clean the house, and mow the lawn. Tr. 75-76. Before his girlfriend moved

1 away, Plaintiff and his girlfriend would go to the mall and movies together. Tr. 78.  
 2 Plaintiff takes care of his two dogs. Tr. 81.

### 3 STANDARD OF REVIEW

4 The ALJ is responsible for determining credibility, resolving conflicts in  
 5 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
 6 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
 7 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
 8 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
 9 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
 10 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
 11 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
 12 another way, substantial evidence is such relevant evidence as a reasonable mind  
 13 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
 14 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
 15 interpretation, the court may not substitute its judgment for that of the ALJ.  
 16 *Tackett*, 180 F.3d at 1097; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595,  
 17 599 (9th Cir. 1999). Nevertheless, a decision supported by substantial evidence  
 18 will still be set aside if the proper legal standards were not applied in weighing the  
 19 evidence and making the decision. *Browner v. Secretary of Health and Human*  
 20 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence supports the  
 21 administrative findings, or if conflicting evidence supports a finding of either  
 22 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*  
 23 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

### 24 SEQUENTIAL EVALUATION PROCESS

25 The Commissioner has established a five-step sequential evaluation process  
 26 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*  
 27 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of  
 28 proof rests upon claimants to establish a prima facie case of entitlement to

1 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once  
2 claimants establish that physical or mental impairments prevent them from  
3 engaging in their previous occupations. 20 C.F.R. § 416.920(a)(4). If claimants  
4 cannot do their past relevant work, the ALJ proceeds to step five, and the burden  
5 shifts to the Commissioner to show that (1) the claimants can make an adjustment  
6 to other work, and (2) specific jobs exist in the national economy which claimants  
7 can perform. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194  
8 (2004). If claimants cannot make an adjustment to other work in the national  
9 economy, a finding of “disabled” is made. 20 C.F.R. § 416.920(a)(4)(i-v).

#### 10 ADMINISTRATIVE DECISION

11 On March 8, 2013, the ALJ issued a decision finding Plaintiff was not  
12 disabled as defined in the Social Security Act.

13 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
14 activity since July 20, 2010, the application date. Tr. 15.

15 At step two, the ALJ determined Plaintiff had the following severe  
16 impairments: history of polysubstance dependence/abuse, learning disorder not  
17 otherwise specified, borderline intellectual functioning, and antisocial personality  
18 disorder. Tr. 15.

19 At step three, the ALJ found Plaintiff did not have an impairment or  
20 combination of impairments that met or medically equaled the severity of one of  
21 the listed impairments. Tr. 16. The ALJ assessed Plaintiff’s residual function  
22 capacity (RFC) and determined he had the ability to perform a full range of work,  
23 with the following nonexertional limitations:

24 [Plaintiff] is able to understand, remember, and carry out simple,  
25 routine, and repetitive tasks. He is able to accept instructions from  
26 supervisors and able to have occasional and superficial interactions  
27 with both coworkers and the general public. [Plaintiff] is able to work  
28 in a predictable workplace environment with only occasional, routine  
changes.

1 Tr. 19.

2 The ALJ concluded at step four that Plaintiff was not able to perform his  
3 past relevant work. Tr. 23.

4 At step five, however, the ALJ determined that, considering Plaintiff's age,  
5 education, work experience and RFC, and based on the testimony of the VE, there  
6 were other jobs that exist in significant numbers in the national economy Plaintiff  
7 could perform, including the jobs of kitchen helper, automobile detailer,  
8 commercial cleaner, sandwich board carrier, cleaner II, harvest worker  
9 (vegetables), and yard laborer. Tr. 23-24.

10 The ALJ thus concluded Plaintiff was not under a disability within the  
11 meaning of the Social Security Act at any time between July 10, 2010, and the date  
12 of the ALJ's decision. Tr. 24-25.

### 13 ISSUES

14 The question presented is whether substantial evidence supports the ALJ's  
15 decision denying benefits and, if so, whether that decision is based on proper legal  
16 standards. Plaintiff contends the ALJ erred by (1) finding Plaintiff did not meet  
17 Listing 12.05C, (2) rejecting the opinions of Plaintiff's medical providers, (3) not  
18 crediting Plaintiff's subjective complaints, and (4) presenting the VE with an  
19 incomplete hypothetical question.

### 20 DISCUSSION

#### 21 A. Listing 12.05C

22 If a claimant meets or equals an impairment listed in 20 C.F.R. Part 404,  
23 Subpart P, Appendix 1 ("the Listings"), the claimant should be found disabled  
24 without further inquiry. *Tackett*, 180 F.3d 1094; 20 C.F.R. § 416.920(d).  
25 Claimants have the initial burden of proving that their symptoms rise to the  
26 severity set forth in the Listings. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir.  
27 2005). Once the claimant presents evidence in an effort to establish equivalence,  
28 the ALJ must compare the claimant's impairments to the Listing criteria. *Id.*

1 Listing 12.05 consists of an “introductory paragraph with the diagnostic  
2 description for intellectual disability . . . and four sets of criteria (paragraphs A  
3 through D).” 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 12.00A ¶ 4. A claimant  
4 must meet the standard set forth in the introductory paragraph and at least one of  
5 the four listed criteria. *Id.* Listing 12.05 reads, in relevant part,

6 Intellectual disability refers to significantly subaverage general  
7 intellectual functioning with deficits in adaptive functioning initially  
8 manifested during the developmental period; i.e., the evidence  
9 demonstrates or supports onset of the impairment before age 22.

10 The required level of severity for this disorder is met when the  
11 requirements in A, B, C, or D, are satisfied . . .

12 C. A valid verbal, performance, or full scale IQ of 60 through 70 and  
13 a physical or other mental impairment imposing an additional and  
14 significant work-related limitation of function.

15 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 12.05.

16 An ALJ may reject a claimant’s IQ scores if they are invalid. *See* 20 C.F.R.  
17 Pt. 404, Subpt. P, App. 1 § 12.05C (requiring a “valid” IQ score to meet the  
18 Listing); *Thresher v. Astrue*, 283 F. App’x 473, 475 (9th Cir. 2008) (“We do not  
19 doubt that an ALJ can decide that an IQ score is invalid.”). In determining an IQ  
20 score’s validity, the ALJ may rely on external evidence of a score’s invalidity, such  
21 as improper testing conditions or a claimant's participation in activities inconsistent  
22 with the IQ score. *See Thresher*, 283 F. App’x. at 475 n.6 (citing cases); *but see*  
23 *Gomez v. Astrue*, 695 F. Supp.2d 1049, 1057 (C.D. Cal. 2010) (“[T]he ALJ cannot  
24 disregard a valid IQ simply because other evidence in the record could support a  
25 finding of nondisability in the absence of such a score.”).

26 In this case, the ALJ did not err in finding that Plaintiff’s IQ scores were  
27 invalid and that Plaintiff did not meet Listing 12.05C. The ALJ did not simply  
28 disregard the IQ scores and cite other evidence in the record supporting a finding

1 of nondisability. *Cf. Gomez*, 695 F. Supp.2d at 1057. Instead, the ALJ carefully  
2 considered the IQ scores in the context of the psychological evaluations which  
3 contained the scores and cited specific statements within the evaluations that cast  
4 doubt on the validity of Plaintiff's IQ scores. Tr. 18-19. The ALJ found the full  
5 scale IQ score of 66 assessed by Dr. Mabee in November 2009, Tr. 265, invalid  
6 because Dr. Mabee noted that Plaintiff likely "over-report[ed] [his] psychological,  
7 cognitive, and somatic symptoms." Tr. 18 (citing Tr. 271). The ALJ found the full  
8 scale IQ score of 67 assessed by Dr. Toews in January 2013, Tr. 335, invalid  
9 because Dr. Toews noted that Plaintiff's motivation was "poor" and that "[n]on-  
10 intellectual factors such as effort and motivation may have affected [the testing]  
11 results." Tr. 18 (citing Tr. 335).

12 Plaintiff argues that the consistency in his IQ scores, assessed several years  
13 apart, bolsters the reliability of the IQ scores. ECF No. 14 at 12. This is not an  
14 unreasonable interpretation of the evidence. But Dr. Mabee and Dr. Toews also  
15 both questioned Plaintiff's reporting and effort during the administration of their  
16 respective tests; therefore, the similarity of Plaintiff's IQ scores in 2009 and 2013  
17 might also have been caused by Plaintiff's questionable performance at both of the  
18 two exams. When the evidence is susceptible to more than one reasonable  
19 interpretation, the Court must defer to the findings of the ALJ. *Burch*, 400 F.3d at  
20 680-81.

21 In conclusion, the ALJ did not err in relying on external evidence to find  
22 Plaintiff's IQ scores invalid. Substantial evidence supports the ALJ's finding that  
23 Plaintiff's IQ scores were invalid due to Plaintiff's over-reporting and poor effort  
24 and motivation during the administration of the two IQ tests.

## 25 **B. Credibility**

26 Plaintiff contests the ALJ's adverse credibility determination. ECF No. 14  
27 at 20.

28 It is generally the province of the ALJ to make credibility determinations,



1 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific  
2 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
3 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's  
4 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d  
5 1273, 1281 (9th Cir. 1996). "General findings are insufficient: rather the ALJ  
6 must identify what testimony is not credible and what evidence undermines the  
7 claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

8 In this case, the ALJ found Plaintiff's medically determinable impairments  
9 could reasonably be expected to cause some of the alleged symptoms; however,  
10 Plaintiff's statements concerning the intensity, persistence, and limiting effects of  
11 these symptoms were not credible. Tr. 19. The ALJ reasoned that Plaintiff was  
12 less than credible because (1) his activities of daily living (ADL) contradicted his  
13 reported limitations; (2) routine treatment notes indicate "normal psychiatric  
14 observations"; (3) Plaintiff did not seek mental health treatment; and, (4) Plaintiff  
15 inconsistently reported his drug and alcohol use and the reasons why he stopped  
16 attending school. Tr. 19-20. The ALJ did not find Plaintiff was malingering.

#### 17 **1. ADL**

18 The ALJ's first reason for discounting Plaintiff's credibility, i.e., that his  
19 symptom testimony was inconsistent with his ADL, is not a specific, clear, and  
20 convincing reason.

21 "[D]aily activities may be grounds for an adverse credibility finding if a  
22 claimant is able to spend a substantial part of his day engaged in pursuits involving  
23 performance of physical functions that are transferable to a work setting." *Orn v.*  
24 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (internal quotation marks omitted). A  
25 claimant need not be "utterly incapacitated," however, to be eligible for benefits.  
26 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

27 The ALJ pointed out that Plaintiff was able to go grocery shopping, prepare  
28 his own meals (mostly by microwave), clean the house, do yard work in the



1 summer, walk across town to get tobacco, walk to Alcoholics Anonymous  
 2 meetings twice a week, take care of two dogs, read comic books, shower, attend  
 3 appointments on a daily basis, accompany girlfriend to her appointments, use  
 4 public transportation, play online video games for hours at a time, and watch  
 5 movies. Tr. 19-20.

6 In is unclear whether Plaintiff's ADL indicate that he "is able to spend a  
 7 substantial part of his day engaged in pursuits involving performance of physical  
 8 functions that are transferable to a work setting." *Orn*, 495 F.3d at 639.

9 Furthermore, Plaintiff does not argue that he is physically incapable of performing  
 10 ADL. Because Plaintiff's ADL do not necessarily contradict his reporting of his  
 11 mental impairments, this reason, standing alone, would not be enough to discredit  
 12 Plaintiff. But given the additional reasons given by the ALJ, discussed *infra*, the  
 13 undersigned finds any error harmless. *See Tommasetti v. Astrue*, 533 F.3d 1035,  
 14 1038 (9th Cir. 2008) (An error is harmless when "it is clear from the record that the  
 15 . . . error was inconsequential to the ultimate nondisability determination.").

## 16 **2. Normal psychiatric observations**

17 The ALJ's second reason for discounting Plaintiff's credibility, i.e., that  
 18 Plaintiff's regular treatment notes document "normal psychiatric observations," is  
 19 a specific, clear, and convincing reason.

20 An ALJ may cite inconsistencies between a claimant's testimony and the  
 21 objective medical evidence in discounting the claimant's testimony. *Bray v.*  
 22 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009).

23 In this case, the ALJ noted that "the regular notations in [Plaintiff's]  
 24 treatment notes" indicated that Plaintiff did not exhibit any neurological symptoms  
 25 or mental health concerns at his medical appointments and that he appeared to have  
 26 normal attention span, concentration, mood, and affect, and was alert and  
 27 cooperative. Tr. 20 (citing 266, 281, 284-86, 315, 319, 321-22). With the  
 28 exception of Dr. Mabee's evaluation where he noted that Plaintiff did not exhibit

1 any mental health symptoms, Tr. 266, the treatment notes cited by the ALJ were  
2 generated from appointments at which Plaintiff sought treatment for ailments  
3 unrelated to his alleged disabilities in this case.

4 Plaintiff argues that the “majority of the record shows *abnormal* psychiatric  
5 observations,” citing the opinions of Drs. Mabee, Toews, and Dougherty. ECF No.  
6 14 at 17. Plaintiff cites to instances in the reports prepared by these doctors where  
7 Plaintiff did appear to exhibit abnormal behavior. *Id.* (citing Tr. 299, 334). But  
8 Plaintiff seems to miss the crux of the ALJ’s reasoning. Based on the records cited  
9 by the ALJ, what the ALJ found incredible was the fact that, when Plaintiff  
10 presented to medical providers during “regular” office visits, he presented without  
11 abnormal symptoms. *See* Tr. 20 (citing Tr. 266, 281, 284-86, 315, 319, 321-22).  
12 But when Plaintiff presented for psychiatric evaluations for purposes of his  
13 disability claim, he presented abnormally. *See* Tr. 299, 334. Furthermore, even if  
14 Plaintiff was correct that a “majority” of the evidence supports that Plaintiff  
15 presented with abnormal psychiatric symptoms, this is not the standard by which  
16 the Court reviews the ALJ’s decision. *See Tackett*, 180 F.3d at 1097-98 (Court  
17 will only reverse the ALJ’s decision if it is not supported by substantial evidence,  
18 which is defined as being more than a mere scintilla, but less than a  
19 preponderance).

20 The ALJ did not err in citing the observations of Plaintiff’s regular medical  
21 sources who observed that Plaintiff did not appear to be suffering from mental  
22 health impairments. These records constitute substantial evidence from which the  
23 ALJ could infer that Plaintiff was less than credible in his symptom reporting.

### 24 **3. Lack of mental health treatment**

25 The ALJ’s third reason for discounting Plaintiff’s credibility, i.e., his  
26 “minimal and mild complaints of mental health concerns, and the lack of  
27 significant mental health treatment,” is a specific, clear, and convincing reason.

28 In assessing a claimant’s credibility, the ALJ may rely on unexplained or

1 inadequately explained failure to seek treatment or to follow a prescribed course of  
2 treatment. *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012). Failure to  
3 follow a course of treatment may be excused, however, if the claimant's  
4 noncompliance is attributable to his or her mental illness. *Id.* at 1114.

5 The ALJ found that Plaintiff's lack of mental health complaints and  
6 treatment suggested that he "is not particularly concerned about his mental health."  
7 Tr. 20. Furthermore, the ALJ noted that Plaintiff failed to follow through with Dr.  
8 Mabee's recommendation that he participate in individual counseling and  
9 medication management. Tr. 21. At the hearing, Plaintiff testified that he had seen  
10 a counselor in the past, but that he was not seeking additional treatment at the time  
11 of the hearing because he was afraid he would abuse medication prescribed to him.  
12 Tr. 78.

13 Given Plaintiff's history of drug and alcohol use, Plaintiff's concern that he  
14 might abuse psychiatric medication is admirable. But his concern fails to explain  
15 why he did not seek individual therapy as recommended by Dr. Mabee or why he  
16 apparently has never consulted a physician (outside of evaluations for SSI and  
17 State benefits) about his mental impairments and available treatments. Plaintiff  
18 argues that his failure to seek mental health treatment should be excused because  
19 not seeking treatment can be attributed to his mental health impairments. ECF No.  
20 14 at 18. But given that Plaintiff participated in counseling in the past, and given  
21 that he gave other reasons for not seeking treatment, i.e., fear of abusing  
22 medication, it does not appear that Plaintiff's mental health impairments impacted  
23 Plaintiff's judgment regarding whether to seek mental health treatment. To the  
24 contrary, Plaintiff's testimony indicates that he made a conscious decision not to  
25 seek treatment.

26 Plaintiff further argues that, even if he participated in treatment, his low IQ  
27 functioning is "not amenable to treatment." ECF No. 14 at 18. But this argument  
28 is contrary to the reports of Drs. Mabee and Dougherty who both opined that

1 Plaintiff could possibly benefit from mental health treatment and medication. Tr.  
2 270, 301. Furthermore, the Court does not possess the expertise to decide whether  
3 Plaintiff's low IQ functioning is amenable to treatment.

4 The ALJ did not err by citing Plaintiff's failure to seek mental health  
5 treatment as a reason to discredit Plaintiff.

#### 6 **4. Inconsistent Testimony**

7 The ALJ's final reason for discounting Plaintiff's testimony, i.e., Plaintiff's  
8 inconsistent statements, is a specific, clear, and convincing reason.

9 In determining a claimant's credibility, the ALJ may consider "ordinary  
10 techniques of credibility evaluation, such as the claimant's reputation for lying,  
11 prior inconsistent statements . . . and other testimony by the claimant that appears  
12 less than candid." *Smolen*, 80 F.3d at 1284.

13 As pointed out by the ALJ, Plaintiff inconsistently reported his drug and  
14 alcohol use. Tr. 20 (citing Tr. 73-74 (Plaintiff testifying that he last used alcohol  
15 five years prior to the hearing, denied using methamphetamine, last used cocaine  
16 ten to eleven years prior to the hearing, and used marijuana a week prior to the  
17 hearing); Tr. 271 (Dr. Mabee noting that Plaintiff has "been dependent on Cocaine,  
18 Opioids, Marijuana and Methamphetamine in the past"); Tr. 296 (Dr. Dougherty  
19 noting that Plaintiff reported he started using marijuana at age twelve, cocaine at  
20 age sixteen, experimented with acid at age fourteen, used methamphetamine from  
21 age eighteen to twenty four); Tr. 334 (Dr. Toews noting that Plaintiff "denies a  
22 history of using drugs")). The ALJ also noted that Plaintiff inconsistently reported  
23 the reasons why he stopped attending school. Tr. 20 (citing Tr. 63 (Plaintiff  
24 testifying that he had "a hard time doing stuff by [him]self," was frustrated and  
25 didn't "understand a lot of stuff"); Tr. 265 (Dr. Mabee noting that Plaintiff  
26 "stopped going to school because he was using alcohol and drugs"); Tr. 295 (Dr.  
27 Dougherty noting that Plaintiff "stopped going to school because he was using  
28 alcohol and drugs")); *see also* Tr. 333 (Dr. Toews noting that Plaintiff "quit school

1 due to multiple expulsions”).

2 The ALJ reasonably concluded that, given Plaintiff’s inconsistent reporting  
3 about his drug and alcohol use and the reasons for dropping out of school,  
4 Plaintiff’s reporting of his symptoms was also suspect. *Smolen*, 80 F.3d at 1284;  
5 *see also Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (ALJ did not err in  
6 citing a claimant’s conflicting information about her drug and alcohol usage in  
7 rejecting the claimant’s testimony). The ALJ did not err in citing Plaintiff’s  
8 inconsistent statements as a reason to discredit Plaintiff.

## 9 **5. Conclusion**

10 Other than the ALJ’s error in using Plaintiff’s ADL to discredit Plaintiff, the  
11 ALJ’s adverse credibility determination is free of legal error and supported by  
12 substantial evidence. The ALJ’s error in using Plaintiff’s ADL to discredit him  
13 was harmless given the additional valid reasons given by the ALJ to support the  
14 ALJ’s adverse credibility determination.

## 15 **C. Evaluation of Medical Evidence**

16 Plaintiff argues that the ALJ failed to properly credit the IQ scores assessed  
17 by Drs. Mabee and Toews and the opinions of Drs. Mabee, Dougherty, and Colby.  
18 ECF No. 14 at 10-14. As the Court addressed the ALJ’s evaluation of Plaintiff’s  
19 IQ scores *supra*, and Plaintiff does not argue that the ALJ otherwise erred in  
20 evaluating the opinions of Dr. Toews, the following discussion is limited to  
21 whether the ALJ properly evaluated the opinions of Drs. Mabee, Dougherty, and  
22 Colby.

23 “In making a determination of disability, the ALJ must develop the record  
24 and interpret the medical evidence.” *Howard ex. rel. Wolff v. Barhart*, 341 F.3d  
25 1006, 1012 (9th Cir. 2003). In weighing medical source opinions, the ALJ should  
26 distinguish between three different types of physicians: (1) treating physicians,  
27 who actually treat the claimant; (2) examining physicians, who examine but do not  
28 treat the claimant; and, (3) nonexamining physicians who neither treat nor examine

1 the claimant. *Lester*, 81 F.3d at 830. The ALJ should give more weight to the  
2 opinion of a treating physician than to the opinion of an examining physician.  
3 *Orn*, 495 F.3d at 631. The ALJ should give more weight to the opinion of an  
4 examining physician than to the opinion of a nonexamining physician. *Id.*

5 When a physician's opinion is not contradicted by another physician, the  
6 ALJ may reject the opinion only for "clear and convincing" reasons. *Baxter v.*  
7 *Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a physician's opinion is  
8 contradicted by another physician, the ALJ is only required to provide "specific  
9 and legitimate reasons" for rejecting the opinion of the first physician. *Murray v.*  
10 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

11 To the extent that the opinions of Drs. Mabee, Dougherty, and Colby support  
12 Plaintiff's allegation of disability, their opinions are contradicted by Rita Flanagan,  
13 Ph.D., a State agency psychological consultant, who opined that Plaintiff's  
14 impairments were not disabling. Tr. 104-08. Therefore, the ALJ was only  
15 required to provide specific and legitimate reasons for discounting the opinions  
16 finding Plaintiff disabled.

17 **1. W. Scott Mabee, Ph.D.**

18 Plaintiff presented to Dr. Mabee for a consultative psychological evaluation  
19 in November 2009. Tr. 265-76. Dr. Mabee diagnosed Plaintiff with polysubstance  
20 dependence, early full remission (per client report); adjustment disorder with  
21 depressed mood; antisocial personality disorder (primary); and borderline  
22 intellectual functioning. Tr. 267. Dr. Mabee assessed Plaintiff with "severe"  
23 limitations in his ability to exercise judgment and make decisions and in his ability  
24 to respond appropriately to and tolerate the pressures and expectations of a normal  
25 work setting. Tr. 269. Dr. Mabee assessed Plaintiff with "marked" limitations in  
26 his ability to relate appropriately to co-workers and supervisors, to interact  
27 appropriately in public contacts, and to maintain appropriate behavior in a work  
28 setting. Tr. 269.



1 In his medical source statement, Dr. Mabee found,

2  
3 [Plaintiff] will be able to understand, remember and carry out simple  
4 verbal and written instructions. He will be able to maintain his  
5 attention and concentration for shor[t] periods of time. His pace of  
6 performance and persistence will be below average. He will work  
7 best by himself and under stric[t] supervision. However, he will  
8 likely be unable to tol[er]ate the supervision. He will be able to ask  
9 questions. He will be aware of normal hazards. He will be able to  
10 travel to unfamiliar places and use public transportation most of the  
11 time.

12 Tr. 269. Dr. Mabee recommended Plaintiff take part in individual counseling,  
13 vocational rehabilitation, and consult a physician to determine if medication would  
14 help control his depressive symptoms. Tr. 270. Dr. Mabee opined that Plaintiff's  
15 impairments would last between six and twelve months and that vocational training  
16 or services would minimize or eliminate barriers to employment. Tr. 270.

17 The ALJ gave some weight to Dr. Mabee's opinion. Tr. 22. The ALJ noted  
18 Dr. Mabee's opinion that Plaintiff would likely be capable of working after  
19 vocational rehabilitation was inconsistent with Dr. Mabee's assessment of several  
20 "severe" and "marked" impairments. Tr. 22. The ALJ also reasoned that Dr.  
21 Mabee, in reaching his conclusions, reviewed no medical records, did not observe  
22 Plaintiff exhibiting any mental health symptoms, and based his opinions on  
23 Plaintiff's unreliable self-reporting. Tr. 22. Furthermore, the ALJ reasoned that  
24 Plaintiff's test scores resulted in an invalid profile suggesting that he over-reported  
25 his symptoms. Tr. 22. Finally, the ALJ noted that Dr. Mabee opined that  
26 Plaintiff's limitations would only last between six and twelve months. Tr. 22.

27 The fact that Dr. Mabee failed to review Plaintiff's records is not a valid  
28 reason to reject his opinions. As Plaintiff has little history of seeking medical  
treatment, it is likely that there were no records for Dr. Mabee to review. The  
ALJ's other reasons for rejecting Dr. Mabee's opinions, however, are specific and



1 legitimate reasons. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005)  
2 (ALJ may rely on internal inconsistencies in discounting medical opinions);<sup>1</sup>  
3 *Thomas*, 278 F.3d at 957 (ALJ may reject a medical opinion that is “inadequately  
4 supported by clinical findings”); *Bayliss*, 427 F.3d at 1217 (medical opinion may  
5 be discounted if it relies on a claimant's unreliable self-report);<sup>2</sup> 42 U.S.C. §  
6

7 <sup>1</sup>Plaintiff argues that Dr. Mabee’s recommendation that Plaintiff participate  
8 in vocational rehabilitation suggests that Dr. Mabee “did not think [Plaintiff] could  
9 work in a normal work setting without rehabilitation (and likely a sheltered work  
10 environment).” ECF No. 19 at 5. While this is a not an unreasonable  
11 interpretation of Dr. Mabee’s opinion, the Court must defer to the ALJ’s  
12 interpretation of the evidence when it is susceptible to more than one rational  
13 interpretation so long as the ALJ’s findings are supported by inferences reasonably  
14 drawn from the record. *Molina*, 674 F.3d at 1111. In this case, the ALJ reasonably  
15 inferred that Dr. Mabee recommended that Plaintiff participate in vocational  
16 rehabilitation because Plaintiff had certain shortcomings, other than his  
17 impairments, that he needed to overcome prior to entering the workplace. Tr. 22.

18 <sup>2</sup>Plaintiff argues that the ALJ erred by finding Dr. Mabee’s report entitled to  
19 less weight because it was based on Plaintiff’s unreliable self-reporting. ECF No.  
20 14 at 12-13. Specifically, Plaintiff argues that the ALJ erred by not “explain[ing]  
21 how she reached this conclusion.” *Id.* (citing *Ghanim v. Colvin*, 763 F.3d 1154,  
22 1162 (9th Cir. 2014)). In *Ghanim*, the Ninth Circuit reiterated the rule that an ALJ  
23 may discount a treating provider’s opinion when the opinion is based “to a large  
24 extent” on a claimant’s self-reports and not on clinical evidence. 763 F.3d at 1162.  
25 In that case, the Ninth Circuit found the ALJ erred when the physicians’ reports  
26 contained their observations, diagnoses, and prescriptions, in addition to the  
27 claimant’s self-reports, and the ALJ did not explain why the physicians’ reports  
28 were “based more heavily” on the claimant’s self-reports. *Id.*

1 1382c(a)(3)(A) (disability must be premised on medically determinable physical or  
2 mental impairments that have “lasted or can be expected to last for a continuous  
3 period of not less than twelve months”). The ALJ did not err in evaluating Dr.  
4 Mabee’s opinions. Because the ALJ gave several valid reasons for rejecting Dr.  
5 Mabee’s assessment of “severe” and “marked” limitations, the ALJ’s error in  
6 citing to Dr. Mabee’s failure to review past records was harmless.

7 **2. Roland Dougherty, Ph.D.**

8 Plaintiff presented to Dr. Dougherty for a psychological evaluation in March  
9 2011. Tr. 294-304. Dr. Dougherty diagnosed Plaintiff with cognitive disorder,  
10 NOS, rule out fetal alcohol effects; adjustment disorder with depression; social  
11 phobia; rule out PTSD; ADHD; alcohol dependence, in sustained remission;  
12 cocaine dependence, in sustained remission; methamphetamine dependence, in  
13 sustained remission; cannabis abuse, in sustained remission; intellectual  
14 functioning in the mild mental retardation to borderline range; and, antisocial and  
15

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16 The Court finds that, contrary to Plaintiff’s contention, and unlike the ALJ in  
17 *Ghanim*, the ALJ in this case provided adequate reasons for finding that Dr.  
18 Mabee’s report was based heavily on Plaintiff’s unreliable self-reporting. First, the  
19 ALJ noted that Plaintiff “demonstrated an invalid testing profile regarding  
20 emotional functioning, and that [Plaintiff] was over-reporting psychological,  
21 cognitive, and somatic symptoms.” Tr. 22 (citing Tr. 271). Second, the ALJ noted  
22 that Dr. Mabee did not observe any symptoms of mental disorders. Tr. 26 (citing  
23 Tr. 266). The fact that Dr. Mabee could not rely on psychological testing to assess  
24 Plaintiff’s impairments, and did not personally observe Plaintiff suffering from any  
25 mental disorders, suggests that Dr. Mabee instead relied mostly on Plaintiff’s self-  
26 reports. As such, the Court finds that the ALJ did not err in discounting Dr.  
27 Mabee’s opinions based on the reason that Dr. Mabee relied on Plaintiff’s  
28 unreliable self-reporting.

1 paranoid personality traits. Tr. 300-01. Dr. Dougherty opined that Plaintiff's  
2 prognosis was "guarded, though it might improve with appropriate mental health  
3 and medication resources." Tr. 301. In his medical source statement, Dr.  
4 Dougherty found,

5 [Plaintiff] was pleasant and cooperative with [Dr. Dougherty]. His  
6 social skills appear to be fair. His thinking was rational though he is  
7 likely to have some comprehension problems and his responses were  
8 at times tangential. He loses interest when doing household tasks and  
9 this may become a problem in an employment situation. He should be  
10 able to understand, remember and follow simple directions. He has  
no significant successful work history.

11 Tr. 301.

12 The ALJ gave "little weight" to Dr. Dougherty's evaluation. Tr. 22. The  
13 ALJ reasoned that Dr. Dougherty relied substantially on Plaintiff unreliable self-  
14 reporting and Dr. Dougherty's medical source statement is vague, does not  
15 describe the most Plaintiff can do, and includes limitations unrelated to Plaintiff's  
16 mental health condition, i.e., "no significant work history." Tr. 22 (citing Tr. 301).

17 The ALJ gave specific and legitimate reasons for giving little weight to Dr.  
18 Dougherty's opinions. An ALJ may reject a medical record heavily based on a  
19 claimant's unreliable reporting, *Bayliss*, 427 F.3d at 1217, and as discussed *supra*,  
20 the ALJ did not err in finding Plaintiff's symptom reporting incredible.<sup>3</sup>

21 \_\_\_\_\_  
22 <sup>3</sup>Like his challenge to the ALJ's evaluation of Dr. Mabee's opinions  
23 discussed in Note 2 *supra*, Plaintiff again challenges the ALJ's discounting of Dr.  
24 Dougherty's opinion based on the grounds that it relied on Plaintiff's unreliable  
25 self-reporting. ECF No. 14 at 13. The ALJ found that Dr. Dougherty "relie[d]  
26 substantially on [Plaintiff's] subjective statements, which [were] not entirely  
27 credible, throughout [Dr. Dougherty's] evaluation." Tr. 22. The ALJ continued,  
28 "As an example, Dr. Dougherty cites the claimant's reported loss of interest in

1 Furthermore, the ALJ did not err in observing that Dr. Dougherty's medical source  
2 statement was vague and improperly took into account non-medical factors. Dr.  
3 Dougherty's conclusions that Plaintiff would "likely . . . have some comprehension  
4 problems," that he "loses interest in doing household tasks," and that his responses  
5 are sometimes "tangential" do not present any specific, quantifiable limitations  
6 regarding Plaintiff's ability to work. In addition, in determining whether a  
7 claimant is disabled, doctors are not qualified to rely on non-medical factors, such  
8 as age and lack of formal education, that would make reentry into the job market  
9 difficult. *Sanchez v. Sect'y of Health & Human Servs.*, 812 F.2d 509, 511 (9th Cir.

10  
11 household tasks and suggests this could be a problem in an employment situation."  
12 Tr. 22 (citing Tr. 301).

13       Upon reviewing Dr. Dougherty's 2011 evaluation, the Court agrees with the  
14 ALJ's conclusion that Dr. Dougherty's evaluation is heavily based on Plaintiff's  
15 self-reporting (both from Dr. Dougherty's review of Plaintiff's medical records and  
16 Dr. Dougherty's own questioning of Plaintiff). *See* Tr. 294-301. Dr. Dougherty  
17 apparently did not administer any psychological tests. Other than his mental status  
18 examination, there is little objective evidence to support Dr. Dougherty's opinions.  
19 Furthermore, as reasoned by the ALJ, the fact that Dr. Dougherty's medical source  
20 statement expressly accounts for Plaintiff's reported "lose . . . [of] interest when  
21 doing household tasks" shows that Dr. Dougherty essentially found Plaintiff's  
22 symptom reporting to be the most Plaintiff was capable of doing despite his  
23 impairments. *See* 20 C.F.R. § 404.1513(b)(6) (medical source statement describes  
24 "what [claimants] can still do despite [their] impairment(s)"). Given the absence  
25 of objective findings in Dr. Dougherty's evaluation, and Dr. Dougherty's  
26 incorporation of Plaintiff's self-reporting directly into Dr. Dougherty's medical  
27 source statement, the Court finds that the ALJ did not err in finding Dr.  
28 Dougherty's evaluation based heavily on Plaintiff's unreliable self-reporting.

1 1987). Thus, the ALJ properly gave no weight to the parts of Dr. Dougherty's  
2 medical source statement that were vague and that took into account non-medical  
3 factors.

4 The ALJ essentially incorporated the remainder of Dr. Dougherty's medical  
5 source statement into the ALJ's RFC determination. *Compare* Tr. 301 (Dr.  
6 Dougherty concluding that Plaintiff has "fair" social skills and is able to  
7 "understand, remember and follow simple directions") *with* Tr. 19 (ALJ finding  
8 Plaintiff had the RFC to have "superficial interactions with both coworkers and the  
9 general public" and to "understand, remember, and carry out simple, routine, and  
10 repetitive tasks").

11 The ALJ did not err in evaluating Dr. Dougherty's opinions.

### 12 **3. Dr. Colby**

13 As part of Plaintiff's application for State benefits, Dr. Colby completed two  
14 forms -- dated June 15, 2010, and July 11, 2010 -- in which he opined that Plaintiff  
15 met Listing 12.05 due to Plaintiff's full scale IQ score of 66 assessed by Dr.  
16 Mabee. Tr. 277-78; *see* Tr. 265 (Dr. Mabee's evaluation). The ALJ gave no  
17 weight to Dr. Colby's opinion that Plaintiff met Listing 12.05 based on the ALJ's  
18 finding that Plaintiff's low IQ scores were invalid. Tr. 17. As discussed *supra*, the  
19 ALJ did not err in finding Plaintiff's IQ scores invalid and that Plaintiff failed to  
20 meet his burden to satisfy the criteria of Listing 12.05C. Therefore, the ALJ  
21 properly rejected Dr. Colby's opinion to the contrary.

### 22 **D. RFC and Hypothetical Questions**

23 Plaintiff argues that the ALJ failed to include all of Plaintiff's limitations in  
24 the ALJ's hypothetical question to the VE. ECF No. 14 at 19-20.

25 "Hypothetical questions posed to the [VE] must set out all the limitations  
26 and restrictions of the particular claimant." *Embrey v. Bowen*, 849 F.2d 418, 422  
27 (9th Cir. 1988). The hypothetical should be "accurate, detailed, and supported by  
28 the medical record." *Tackett*, 180 F.3d at 1101. The testimony of a VE "is

1 valuable only to the extent that it is supported by medical evidence.” *Sample v.*  
2 *Schweiker*, 694 F.2d 639, 644 (9th Cir. 1982). The VE’s opinion about a  
3 claimant’s RFC has no evidentiary value if the assumptions in the hypothetical are  
4 not supported by the record. *Embrey*, 849 F.2d at 422. Nonetheless, an ALJ is  
5 only required to present the VE with those limitations the ALJ finds to be credible  
6 and supported by the evidence. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-66 (9th  
7 Cir. 2001).

8 In this case, the ALJ asked the VE if a person with Plaintiff’s background  
9 could work if the person was

10 [A]ble to work at all exertional levels except that this individual  
11 would have the ability to understand, remember, and carry out simple,  
12 routine, and repetitive tasks; would be able to accept instructions from  
13 supervisors and able to have occasional and superficial interactions  
14 with both coworkers and the general public; and would be able to  
15 work in a predictable workplace environment with only occasional  
routine changes.

16 Tr. 85. This hypothetical question included all the limitations that the ALJ  
17 included in her RFC determination. *See* Tr. 19. The VE opined that such a person  
18 would not be able to do Plaintiff’s past relevant work as a child monitor. Tr. 86.  
19 But the VE concluded that such a person could perform a variety of other jobs  
20 including kitchen helper, automobile detailer, commercial cleaner, cleaner II,  
21 harvest worker (vegetables), and yard laborer. Tr. 86-87.

22 Plaintiff’s counsel asked the VE if a hypothetical person with the limitations  
23 posed by the ALJ could work if the individual would need to be under strict  
24 supervision twenty percent of the time and that the individual would not be able to  
25 handle such supervision. Tr. 91. The VE opined that such a limitation would  
26 preclude employment. Tr. 91.

27 Plaintiff argues that the ALJ’s hypothetical question fails to account for  
28 Plaintiff’s low IQ scores and the limitations assessed by Drs. Mabee, Dougherty,

1 and Colby. As discussed *supra*, however, the undersigned concluded that the ALJ  
2 properly discounted the opinions of these doctors to the extent that they assessed  
3 greater limitations than those included in the ALJ's RFC determination. The  
4 ALJ's hypothetical question to the VE was not in error because the ALJ included  
5 all the limitations the ALJ found to be credible and supported by the evidence.  
6 *Osenbrock*, 240 F.3d at 1165-66.

### 7 CONCLUSION

8 Having reviewed the record and the ALJ's findings, the Court finds the  
9 ALJ's decision is supported by substantial evidence and not based on legal error.  
10 Accordingly,

#### 11 IT IS ORDERED:

12 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
13 **GRANTED**.

14 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

15 The District Court Executive is directed to file this Order and provide a copy  
16 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**  
17 **and the file shall be CLOSED**.

18 DATED June 29, 2015.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE